upon the plaintiff was wholly unexpected. The evidence does not show that the plaintiff's injury resulted from negligence on the part of the defendant.

The judgment complained of must be affirmed.

Affirmed.

UNITED STATES EXPRESS CO. *v.* CITY OF PORTSMOUTH.

March 13, 1913.

[77 S. E. 506.]

Commerce (§ 33*)—Interstate Commerce—Transactions Not Constituting.—An ordinance of Portsmouth, Va., imposing a license tax on express companies engaged in transporting packages, etc., to other points in the state, does not violate the federal constitutional provision which gives Congress power to regulate interstate commerce, as to an express company whose intrastate shipments are carried by boat to Washington, D. C., and transferred there to trains.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 81; Dec. Dig. § 33.*]

Error to Circuit Court of City of Portsmouth.

The United States Express Company was convicted of violating an ordinance of the City of Portsmouth, and brings error. Affirmed.

Thos. W. Shelton, of Norfolk, and *Frank H. Platt,* of New York City, for plaintiff in error.

John W. Happer, of Portsmouth, for defendant in error.

BUCHANAN, J. The plaintiff in error, the United States Express Company, was convicted of violating an ordinance of the city of Portsmouth imposing a license tax on express companies carrying on business in the city.

The ordinance imposing the tax is as follows: "Every express company, or person, firm or corporation engaged in the business of transporting packages parcels or other property in the city of Portsmouth, as the original point of delivery, to be delivered or carried to a point outside of the city, but within the state of Virginia, shall pay for doing such business but not including any business for delivering parcels, packages or other property to the city of Portsmouth to be delivered at a point without the state of Virginia, or of receiving parcels, packages, or other property in the city of Portsmouth, to be delivered with-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

out the state of Virginia, and not including any business done for the government of the United States, of the state of Virginia, their officers or agents, a license tax of $100.00 per year or part of a year, and an additional tax on each cart, delivery truck or wagon, as provided by section on 'carts, drays, trucks or wagons.'"

The United States Express Company has a place of business in the city of Portsmouth, and, without paying the license required by the said ordinance, carried a package from that city to the city of Staunton. The points of shipment and of destination are in the state of Virginia, though the route by which the package was shipped is not entirely within the state.

It appears from the agreed statement of facts: "That the United States Express Company enters the city of Portsmouth only by way of the boats of the Norfolk & Washington Steamboat Company, plying between Portsmouth, Va., and Washington, D. C. The package was thereupon placed aboard one of the steamers plying between Portsmouth, Va., and Washington, D. C., and transported to the city of Washington. It was there transferred across the city of Washington in its wagon, and delivered to a messenger of the United States Express Company operating on the Baltimore & Ohio Railway, and thence transported in one of the cars of the Baltimore & Ohio Railway, through the state of Maryland to Harper's Ferry, and thence over the lines of the Baltimore & Ohio Railway, upon which the United States Express Company operates, to Staunton, Va., where it was delivered to the consignee in due course of business, this being the usual, the necessary, and the only route by which the United States Express Company could have transported this package."

The only question involved in this writ of error is whether the tax thus imposed is a regulation of or burden upon interstate commerce, and therefore in violation of the federal Constitution, which vests in Congress the sole authority to regulate commerce among the states.

The precise question involved in this case was determined by the Supreme Court of the United States, on January 6th of this year, in the case of Ewing *v.* City of Leavenworth, reported in 226 U. S. 464, 33 Sup. Ct. 157, 57 L. Ed. ——. That decision is; as it seems to us, conclusive of this case. So far as they affect the question involved here, the facts of that case and the ordinance, the constitutionality of which is denied, were substantially the same as the facts of this case and the ordinance of the city of Portsmouth.

In deciding that case the court, among other things, said: "We are of opinion that this case is controlled by Lehigh Valley Rail-

road v. Pennsylvania, 145 U. S. 192 [202, 12 Sup. Ct. 806, 808 (36 L. Ed. 672)], in which it was held that a state might tax the receipts of a railroad corporation for the portion of the transportation which was within the state, although the transportation then in question, while between points within the state, passed over the railroad which traversed, for a part of the way, territory of an adjoining state. It was held that a tax upon such receipts did not tax interstate commerce, and this court said:

" 'It should be remembered that the question does not arise as to the power of any other state than the state of the termini, nor as to taxation upon the property of the company situated elsewhere than in Pennsylvania, nor as to the regulation by Pennsylvania of the operations of this or any other company elsewhere, but it is simply whether, in the carriage of freight and passengers between two points in one state, the mere passage over the soil of another state renders that business foreign which is domestic. We do not think such a view can be reasonably entertained, and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk.'

"The Lehigh Valley Case was cited with approval in U. S. Express Co. v. Minnesota, 223 U. S. 335, 342 [32 Sup. Ct. 211, 56 L. Ed. 459], as determinative of the proposition that the state of Minnesota might tax the receipts of an express company from the transportation of packages from points within the state to other points therein, although the transportation was in part outside of the state.

"It is contended, however, that the contrary result must be reached, applying the principles laid down in Hanley v. Kansas City Southern Ry. Co., 187 U. S. 617 [23 Sup. Ct. 214, 47 L. Ed. 333]. In that case this court declared unconstitutional a law of Arkansas undertaking to fix rates upon railway transportation; the transportation in question in that case being a single carriage partly outside of the state of Arkansas from a point within, to another point within, the state. In the particular instance the transportation covered 116 miles, of which only 52 miles were within Arkansas and the rest without the state. It was held that the right to regulate such commerce was solely in Congress under the Constitution, and that the transportation was a single and entire thing, and as a subject for rate legislation was indivisible. The case of Lehigh Valley Railroad v. Pennsylvania, supra, was called to the attention of the court, and of that case this court said [187 U. S. page 621, 23 Sup. Ct. 215, 47 L. Ed. 333]:

" 'That was the case of a tax and was distinguished expressly from an attempt by a state directly to regulate the transportation while outside its borders. 145 U. S. 204 [12 Sup. Ct. 806, 36 L.

Ed. 672]. And, although it was intimated that, for the purposes before the court, to some extent commerce, by transportation, might have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes. Moreover, the tax "was determined in respect of receipts for the proportion of the transportation within the state." 145 U. S. 201 [12 Sup. Ct. 806, 36 L. Ed. 672]. Such a proportioned tax had been sustained in the case of commerce admitted to be interstate. Maine *v.* Grand Trunk Railway Co., 142 U. S. 217 [12 Sup. Ct. 121, 163, 35 L. Ed. 994]. Whereas it is decided, as we have said, that when a rate is established, it must be established as a whole.'

"The distinction is applicable here. There is no attempt to fix a rate by the authority of the state, which, while single and complete in itself, covers, for a considerable part, interstate transportation. The privilege tax levied in this case expressly excludes commerce of an interstate character or business done for the government, and is levied solely on the business done in the city of Leavenworth in receiving packages from points within the state and in transporting packages to like points. Applying the principles of the Lehigh Valley Case to such a situation, we are of opinion that, for the purpose of a privilege tax for business thus done, the municipality, acting under authority of the state, did not exceed its just power."

The trial court in this case having reached a conclusion in accord with that decision, its judgment must be affirmed.

Affirmed.